Mississippi College Law Review

Volume 3 | Issue 1 Article 8

6-1-1982

Criminal Procedure - Mistrial, Manifest Necessity, and the Mississippi Standard - Jones v. States

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Custom Citation

3 Miss. C. L. Rev. 125 (1982-1983)

CRIMINAL PROCEDURE—Mistrial, Manifest Necessity, and the Mississippi Standard—*Jones v. State*, 398 So. 2d 1312 (Miss. 1981).

I.

Howard Jones was indicted on a charge of aggravated assault, and his first trial began on September 7, 1979. Several law enforcement officers were called as prosecution witnesses and testified that Jones was given the standard Miranda warning prior to questioning. Following this testimony the prosecution introduced a tape recording of Jones' alleged confession. However, the first statement on the tape was a request by Jones for an attorney. The defense counsel immediately objected and the court declared a recess. Out of the presence of the jury it was learned that there were two tapes and the prosecution had played the wrong one. The court and both attorneys retired to chambers and heard each tape. Afterwards, the court recalled the jury and announced that the confession would be excluded because the evidence was apparently obtained in violation of the defendant's constitutional rights. At this point the prosecution moved for a mistrial. The court granted this motion and the jury was dismissed. The defendant did not object.

The second trial began on March 6, 1980. Prior to trial, the defendant filed a motion to dismiss alleging double jeopardy. This motion was denied. At trial the defendant was convicted and received a fifteen year sentence.

On appeal the Mississippi Supreme Court reversed the lower court decision and discharged the defendant. In so doing, the court announced a new rule which states that "jeopardy attaches at the moment the trial jury is selected and sworn to try the case."[1]

In reaching this decision the court was called upon to decide two important issues. The first was whether jeopardy had attached when the state moved for a mistrial. The court, by answering in the affirmative, abandoned a long-standing line of Mississippi cases[2] and chose to follow the federal rule.[3] Prior to this case,

1. Jones v. State, 398 So. 2d 1312, 1314 (Miss. 1981).

2. Bounds v. State, 271 So. 2d 435 (Miss. 1973); State v. Pace, 210 Miss. 448, 49 So. 2d 710 (1951); Jones v. State, 144 Miss. 52, 109 So. 265 (1926); Lovern v. State, 140 Miss. 635, 105 So. 759 (1925); Price v. State, 36 Miss. 531 (1858); State v. Moor, 1 Miss. 134 (1 Walker) (1823).

3. This rule was announced in Downum v. United States, 372 U.S. 734 (1963).

the rule in Mississippi stated that jeopardy could only attach after a verdict had been rendered.[4]

The second issue the court decided was whether the trial court abused its discretion in granting the prosecution's motion for a mistrial. Again the court answered in the affirmative, relying on the doctrine of manifest necessity first announced in *United States v. Perez*.[5] This doctrine allows a retrial after mistrial if there was a "manifest necessity" for the mistrial.

BACKGROUND

At common law jeopardy did not attach until a verdict was rendered. If a defendant believed that he had been subjected to double jeopardy, he could enter one of two pleas. The first, *autrefois acquit,* disallowed the retrial of a defendant who had been acquitted. The second, *autrefois convict,* disallowed retrial after a prior conviction for the same offense.[6]

The courts in the United States followed the common law rule until 1824 when the court recognized in *Perez* that there were occasions when jeopardy might attach before a jury reached a verdict.[7] However, it was not until 1963 in *Downum v. United States*[8] that the Supreme Court explicitly stated that jeopardy attached when the jury was sworn.[9]

In 1969 the Supreme Court decided *Benton v. Maryland*[10] and held that the protections of the fifth amendment were applicable to the states through the due process clause of the fourteenth amendment.[11] *Illinois v. Somerville*[12] in 1973, as well as *Crist v. Bretz*[13] in 1977 reaffirmed the *Benton* rule, which is a command to the states to apply the federal rule in double jeopardy questions.[14]

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4. MISS. CONST. art. III, § 22.

5. 22 U.S. (9 Wheat.) 579 (1824).

6. *See* 4 BLACKSTONE, COMMENTARIES, ON THE LAWS OF ENGLAND 329-30 (1769); C. WHITEBREAD, CRIMINAL PROCEDURE: AN ANALYSIS OF CONSTITUTIONAL CASES AND CONCEPTS 482 (1980).

7. United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824).

8. 372 U.S. 734 (1963). It had been recognized prior to *Downum* that jeopardy attached before a verdict was reached. However, the exact moment was not specified.

9. In bench trials jeopardy attaches when the first witness is sworn. Serfass v. United States, 420 U.S. 377 (1975).

10. 395 U.S. 784 (1969).

11. *Id.* at 794. *Benton* overruled Palko v. Connecticut, 302 U.S. 319 (1937), a case which held that Fifth Amendment protections were not applicable to the states.

12. 410 U.S. 458 (1973).

13. 437 U.S. 28 (1977).

14. "[T]he double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage . . . [I]t should apply to the States . . . ." 395 U.S. at 794.

TRACING THE MISSISSIPPI RULE

The Mississippi Supreme Court's analysis of the fifth amendment to the federal constitution has followed a different channel. In 1923, in *State v. Moor,*[15] the supreme court first interpreted the double jeopardy clause and held that jeopardy could never attach until the jury had rendered a verdict.[16]

In 1969 Mississippi redrafted the state constitution and rearranged the double jeopardy clause to read that "no person's life or liberty shall be twice placed in jeopardy for the same offense."[17] Although the legislature changed the order of the words, the meaning and effect of the clause was unchanged. The court recognized this but chose to follow a different course in *Teat v. State*[18] where they held that a party is placed in jeopardy whenever, upon a valid indictment, in a court of competent jurisdiction and before a legally constituted jury, his trial had been *fairly entered upon.*[19] This decision was reinforced in *Helm v. State*[20] where the court, using essentially the same language, stated that jeopardy attached when the trial has been *fairly commenced.*[21] Although these terms do not pinpoint the actual moment when jeopardy attaches, it does indicate a marked change from the *Moor* standard.[22]

These cases have proved to be forerunners of the decision in *Jones.* However, less than one year after the *Helm* decision, a new constitution was drafted which destroyed their precedential value. The double jeopardy provision was expanded to include the requirement of "an actual acquittal or conviction on the merits to bar another prosecution."[23] The court had strictly adhered to this requirement until the *Jones* decision.

TRACING THE FEDERAL RULE

In certain situations trials end before there is a final adjudication of the criminal defendants. The overwhelming majority of these cases end in a mistrial. Mistrials are granted when a jury

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15. 1 Miss. 134 (1 Walker) (1823).
16. *Id.* at 139.
17. MISS. CONST. of 1869, art. I, § 5. Ths provision changed the original 1817 constitutional provision which read "No person shall, for the same offense, be twice put in jeopardy of life or limb." MISS. CONST. of 1817, art. I, § 13.
18. 53 Miss. 439 (1876).
19. *Id.* at 453. (emphasis added).
20. 66 Miss. 537, 6 So. 322 (1889).
21. *Id.* at 547, 6 So. at 324.
22. Jeopardy now attached before the jury rendered a verdict. 1 Miss. (1 Walker) 134 (1823).
23. MISS. CONST., art. III, § 22.

is unable to reach a verdict,[24] when there is evidence of prosecutional or judicial overreaching,[25] or when it is learned that a member of the jury is prejudiced.[26]

The first case to address the issue of whether double jeopardy attached to bar retrial was *United States v. Perez.*[27] A mistrial occurred because the jury was unable to agree upon a verdict. The court announced that the double jeopardy clause did not bar retrial of the defendant if there was a "manifest necessity" for the granting of the mistrial.[28]

The manifest necessity doctrine is not a rule; rather, it is a standard which trial judges must apply to determine whether an occurrence at trial had prejudiced the defendant so severely as to merit the granting of a mistrial. The court came closest to defining the doctrine in *Arizona v. Washington,*[29] where speaking through Justice Stevens the court said:

> The words "manifest necessity" appropriately characterized the magnitude of the prosecutor's burden . . . . [I]t is manifest that the key word necessity cannot be interpreted literally; instead . . . we assume that there are degrees of necessity and we require a "high degree" before concluding a mistrial is appropriate.[30]

The trial court's decision in granting a mistrial is a weighted one. On one hand there is the defendant's valued right to have his trial completed by a particular tribunal.[31] Why is this important? There are several factors to be considered. First, there is the financial and emotional burden placed on the defendant by repeated trials. Second, by allowing the prosecution another chance in a second trial, the risk is enhanced that an innocent defendant may be convicted. Retrials after mistrials often take place several months or even years after the original trial. In that time witnesses may forget minute facts that could be extremely important to the

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24. Logan v. United States, 144 U.S. 263 (1892); United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824).

25. *See* United States v. Jorn, 400 U.S. 470 (1971).

26. Simmons v. United States, 142 U.S. 148 (1891).

27. 22 U.S. (9 Wheat.) 579 (1824). Some legal writers have argued that *Perez* was not a constitutional case because at the time it was decided, jeopardy did not attach until the verdict was entered. Since the trial ended in a "hung jury," the defendant was not subjected to double jeopardy. *Crist v. Bretz* rebutted this argument saying that *Perez* need not be read as a constitutional case, but the court "summarily dismissed the possibility that *Perez* was decided on different grounds." *Crist,* 437 U.S. 28, 34 n. 10 (1977). *See* Findlater, *Retrial After a Hung Jury: The Double Jeopardy Problem,* 129 U. PA. L. REV. 701 (1981); 77 HARV. L. REV. 1272 (1964).

28. 22 U.S. (9 Wheat.) at 580-81 (1824).

29. 434 U.S. 497 (1978).

30. *Id.* at 505

31. *See* Illinois v. Somerville, 410 U.S. 458 at 466 (1973); United States v. Jorn, 400 U.S. 470 at 485, 486 (1971); Green v. United States, 355 U.S. 184 at 187-88 (1957); Wade v. Hunter, 336 U.S. 684 at 689 (1949).

defendant's case. Even slight shifts in a witness's account of the facts might draw the line between a verdict of guilt or innocence for the defendant.[32]

On the opposing end of the trial court's balance is the public's interest in a fair trial designed to end in a just judgment. In *Wade v. Hunter*[33] the court held that "a trial can be discontinued when particular circumstances manifest a necessity for so doing and when failure to discontinue would defeat the end of justice."[34]

The factor that tempers the balance is the role of the trial judge in granting or refusing to grant a mistrial. *Perez* established the sound exercise of discretion standard to aid trial courts in their decision. Here Justice Story, in an oft-quoted passage, speaking of the trial courts, said:

> They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, . . . afterall, they have the right to order the discharge [of the accused]; and the security which the public has for the faithful, sound and conscientious exercise of this discretion, rests . . . upon the responsibility of the Judges, under their oaths of office.[35]

The Supreme Court has never established "bright line" rules to determine when there is a manifest necessity for a trial court to declare a mistrial. In fact the court has declined at every occasion to set such rigid rules.[36] By giving the trial court discretion to grant the mistrial balanced by the rights of the defendant and the public's interest in just judgments, the court has a standard which is flexible and adaptable to all situations.[37] Although there are no mechanical rules that must be mandatorily applied, some liberal guidelines have been established through a series of Supreme Court cases.[38]

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32. *See* Green v. United States, 355 U.S. 184 at 187-88 (1957); Carsey v. United States, 392 F.2d 810, 813-814 (D.C. Cir. 1967). In *Carsey* the defendant was charged with the murder of his wife. A witness testified in the first trial that defendant and his wife had been acting like honeymooners. By the time the fourth trial began the witness' testimony had changed to describe their words as "firm, and possibly cross." 392 F.2d at 813.

33. 336 U.S. 684 (1949).

34. *Id.* at 690.

35. 2 U.S. (9 Wheat.) at 580.

36. *See* United States v. Jorn, 400 U.S. 470 at 486. These rules would "only disserve the vital competing interest of the Government and the defendant." *Id.*

37. *Id.*

38. Arizona v. Washington, 434 U.S. 497 (1978); Illinois v. Somerville, 410 U.S. 458 (1973); Jorn v. United States, 400 U.S. 470 (1971); Downum v. United States, 372 U.S. 734 (1963); Gori v. United States, 367 U.S. 364 (1961); Lovato v. State of New Mexico, 242 U.S. 199 (1916); Thompson v. United States, 155 U.S. 271 (1894); Logan v. United States, 144 U.S. 263 (1892); Simmons v. United States, 142 U.S. 148 (1891).

Simmons v. United States[39] was one of the earliest cases in which the court applied the *Perez* manifest necessity standard. After the jury had been sworn, the prosecution was informed that one of the jurors had previously lived with the defendant. Although the defendant denied this, the court believed there were sufficient grounds for a mistrial. The Supreme Court affirmed this decision and said,

> There can be no condition of things in which the necessity for the exercise of this power [to grant a mistrial] is more manifest . . . than when . . . the jurors or any one of them is subject to such bias or prejudice as not to stand impartial between the government and the accused.[40]

In *Logan v. United States*[41] a trial judge granted a motion for mistrial over the objections of the defendant after jurors deliberated for forty hours without reaching a verdict. The Supreme Court, echoing *Perez* and *Simmons,* held that any question of granting a mistrial must be finally decided by the presiding judge in the "sound exercise of his discretion."[42] Because it was obvious that any further attempts to reach a verdict were futile, the judge acted correctly in granting the mistrial.

In *Thompson v. United States*[43] and *Lovato v. New Mexico*[44] the respective trial courts were faced with the options of proceeding with the trial and facing certain reversal on appeal because of procedural errors, or declaring a mistrial.[45] In each case the Supreme Court held that the ends of public justice would be defeated if the trial courts were not allowed to correct procedural improprieties as they occurred.[46]

The manifest necessity doctrine took an interesting turn in 1961 in *Gori v. United States.*[47] Here the trial court declared a mistrial on its own motion after the prosecuting attorney began questioning a witness in an effort to bring into evidence other

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39. 142 U.S. 148 (1891).
40. *Id.* at 154.
41. 144 U.S. 263 (1892).
42. *Id.* at 298 (relying on *Perez*).
43. 155 U.S. 271 (1894).
44. 242 U.S. 199 (1916).
45. In *Thompson* one witness had been questioned when it came to the court's attention that one of the jurors should be disqualified because he had been a member of the grand jury that indicted the defendant. In *Lovato,* the defendant first pled not guilty, then demurred to the indictment alleging that it charged no offense. The demurrer was overruled and the case went to trial. The prosecutor moved for a mistrial because the defendant had not been arraigned after the demurrer was overruled. The defendant again pled not guilty. The Supreme Court affirmed the subsequent conviction because the error was "a mere irregularity of procedure which deprived him of no right." 242 U.S. at 201.
46. *Thompson,* 155 U.S. at 274; *Lovato,* 242 U.S. at 202.
47. 367 U.S. 367 (1961).

crimes committed by the defendant. Despite this misbehavior by the attorney, the Court allowed a retrial of the defendant, because the trial court was acting in the sole interest of the defendant.[48] The Court went further to say that the decision was "neither apparently justified nor clearly erroneous" and since trial courts are granted broad discretion under *Perez*, a retrial would not be barred.

In *Downum v. United States*[49] a jury was empanelled in the morning and told to return in the afternoon for trial. When the jury returned, the prosecutor moved for a mistrial because a key witness failed to appear. The defendant's motion for a continuance was denied and the jury was discharged. The Supreme Court overturned the defendant's subsequent conviction because there was no manifest necessity for a mistrial.

Here the court had an outlet before granting a mistrial. Had it instead granted a continuance, the prosecution would have had an opportunity to subpeona the missing witness.

United States v. Jorn[50] followed the decision in *Downum*. This case involved an income tax preparer who had fraudently prepared returns for several clients. The prosecution called as witnesses five taxpayers whose returns were completed by the defendant. The court refused to allow the witnesses to testify because it was not convinced that they had been adequately warned of the constitutional right against self-incrimination. The court abruptly discharged the jury. The Supreme Court, in disallowing a retrial held that "it seems abundantly apparent that the trial judge made no effort to exercise a sound discretion to assure that, taking all circumstances into account, there was a manifest necessity for a *sua sponte* declaration of this mistrial."[51]

Once again the trial court had an alternative to the granting of a mistrial. A continuance would have allowed the five witnesses an opportunity to contact their own attorneys and determine whether it would be in their own best interest to testify.

In *Illinois v. Somerville*[52] the trial court had no outlet before granting a mistrial. The indictment charging the defendant with theft was defective because it failed to allege a key element of the offense charged: intent to permanently deprive the owner of

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48. *Id.* at 369-370. *See* Carsey v. United States, 392 F.2d 810 (D.C. Cir. 1967). "Under the doctrine of necessity, misbehavior by defense counsel that intrudes on a fair trial permits a mistrial without prejudice to a retrial." *Id.* at 818.

49. 372 U.S. 734 (1963).

50. 400 U.S. 470 (1971).

51. *Id.* at 487.

52. 410 U.S. 458 (1973).

his property. Under Illinois law the indictment could not be amended to cure the defect. The Supreme Court reversed a Seventh Circuit decision and held that the test of manifest necessity had been met because the trial judge had no option except to grant a mistrial. Here the court used a balancing test and held that "the defendant's interest in proceeding to verdict is outweighed by the competing and equally legitimate demand for public justice."[53]

It is interesting to note that misconduct by the defense counsel will not bar retrial if the attorney's conduct was the reason for the mistrial.[54] In *Dinitz v. United States*[55] the trial court expelled the defendant's attorney after he had failed to follow the court's direction to limit his opening statement of the facts to what would be proved by the testimony. The court gave the defendant, a law student, the option of proceeding with the trial or moving for a mistrial. The defendant chose the latter. The Fifth Circuit held that retrial was barred.[56] However, the Supreme Court reversed, holding that the trial court's banishment was not done in bad faith because the attorney was guilty of improper conduct.[57] The court did not address this alternative, but the defendant in effect waived any claim of double jeopardy by requesting the mistrial.

In *Arizona v. Washington*[58] the Arizona Supreme Court granted the defendant a new trial when it was learned that the prosecution had suppressed exculpatory evidence. When the defense counsel made mention of the fact in his opening statement, the prosecution moved for a mistrial alleging that the statement had prejudiced the jury. The Supreme Court allowed the retrial and held:

> In a strict, literal sense, the mistrial was not "necessary." Nevertheless, the overriding interest in the evenhanded administration of justice requires that we accord the highest degree of respect to the trial judge's evaluation of the likelihood that the impartiality of one or more jurors may have been affected by the improper comment.[59]

THE STATUS OF *Gori*

In light of these subsequent decisions, it is important to determine their effect on *Gori*. The plurality in *Jorn* seemed to allow a trial court greater discretion and to hold that there is a greater

53. *Id.* at 471.

54. *See* Arizona v. Washington, 434 U.S. 497 (1978); Dinitz v. United States, 424 U.S. 600 (1976).

55. 424 U.S. 600 (1976).

56. *See* United States v. Dinitz, 492 F.2d 53 (1974).

57. 424 U.S. at 611.

58. 434 U.S. 497 (1978).

59. *Id.* at 511.

manifest necessity when the court is protecting the rights of the defendant as opposed to the rights of a witness.[60] Justice Stewart, dissenting in *Jorn,* called the decision "flatly inconsistent" with *Gori.*[61] He went further to say the abuse of discretion standard relied on by the plurality was insufficient to meet the *Gori* balance.[62] The test is not an abuse of discretion but an abuse of the trial process.[63]

From this opinion there appear to be two approaches to the status of *Gori.* Upon a realistic reading of the *Jorn* plurality it appears that *Gori* has been undercut by these decisions. Alternatively, it is possible that *Gori* still stands but is only applicable in limited areas. In the future it is likely that the Court will blend *Gori* with new cases in an effort to establish a more certain standard.

ANALYSIS AND CONCLUSION

As previously mentioned, a request by the defendant for a mistrial will act as a waiver of the double jeopardy claim.[64] This is generally true unless there are other circumstances. In *Oregon v. Kennedy*[65] the Court clarified a misunderstanding of the prosecutorial or judicial "overreaching standard."[66] The newly announced test is based on the intent of the prosecutor. The determinative factor is whether any statement or action taken by the prosecutor was done to provoke the defendant into requesting a mistrial.[67]

A more interesting situation occurs when the defendant does not object to the granting of a mistrial. Does this mean that he consents to a retrial? In *Jones,* the Supreme Court said no.[68] The court offered two reasons for this decision. First, the trial court could have allowed an objection by the defense counsel had it any

60. 400 U.S. at 482.
61. *Id.* at 491.
62. *Id.* at 493.
63. *Id.* at 492.
64. *See* United States v. Jorn, 400 U.S. 470, 485 (1971).
65. 456 U.S. 667, (1982).
66. "Because of the confusion which these varying statements of the standard in question have occasioned in other Courts, we deem it best to acknowledge the confusion and its justifiability . . . ." 456 U.S. 667.
67. "[W]e do hold that the circumstances under which such a defendant may invoke the bar of double jeopardy in a second effort to try him are limited to those cases in which the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial." 456 U.S. 667.
68. 398 So. 2d at 1318.

intention of sustaining it.[69] Second, the court held that the "defendant isn't required to object to avail himself of the constitutional privilege against being prosecuted twice." [70] The court went further to say that certain gray areas exist here.[71] This raises several questions. By adhering to the first argument, wouldn't this, in effect, amount to a *sua sponte* declaration of a mistrial and bar retrial under *Jorn*? Wouldn't this eradicate the second argument? Or is it necessary for the defendant to object at all when there is a manifest necessity for the mistrial?

In conclusion, the decision in *Jones* was necessary to comply with the federal mandate of *Crist*. By changing the attachment rule, Mississippi is in line with the constitutional standard. Jeopardy now attaches when the jury is sworn. Generally, a mistrial will bar retrial of a criminal defendant unless there exists a manifest necessity for the mistrial. If the defendant requests the mistrial, he is said to have waived any double jeopardy claim. However, if a mistrial occurs for other reasons, the manifest necessity standard must be applied to determine if the retrial is barred.

Although this decision is in conflict with the constitutional provision, it is a necessity to update and modernize the Mississippi standard.

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69. *Id.*
70. *Id.*
71. *Id.*